SUPREME COURT U. S.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 978

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and MACKEY AIRLINES, INC., MASTER EXECUTIVE COUNCIL NO. 103, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioners,

vs.

ROBERT C. TISCHLER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Air Line Pilots Association, International, and Mackey Airlines, Inc., Master Executive Council No. 103, Air Line Pilots Association, International, by their undersigned attorney, Wyatt Johnson, pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above case on October 28, 1968.

OPINIONS BELOW

The opinion of the United States District Court, Southern District of Florida, is contained in three (3) orders entitled respectively "Findings of Fact and Conclusions of Law", "Judgment for Plaintiff" and "Order". The Findings of Fact and Conclusions of Law and Judgment for Plaintiff are unreported.

The United States Court of Appeals for the Fifth Circuit rendered four (4) orders herein: a three (3) line Per Curiam affirmance of the District Court, a two (2) line denial of a rehearing, a Judgment and a three (3) line denial of a motion by the respondent for an additional allowance of the sum of $4,111.93 as attorneys' fees for the handling of the appeal from the District Court. The Per Curiam affirmance of the District Court is reported at __ F.2d __ (not reported as of this date).

Copies of all of the foregoing are appended hereto in accordance with Rule 23(1)(i).

JURISDICTION

The judgments of the Court of Appeals for the Fifth Circuit were made and entered on October 28, 1968, November 22, 1968, December 5, 1968, and December 11, 1968, and copies thereof are appended to this petition in the Appendix at pp. 20, 21, 22, 23-24. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The respondent, an airline pilot, filed a suit to require his collective bargaining representative under the Railway Labor Act, the petitioner, Air Line Pilots Association, International, through its Mackey Airlines Master Executive Council No. 103 (presently non-existent), to establish for the respondent a different and earlier date of hire than that assigned to him by the petitioner. The respondent was successful in his litigation and, in fact, did obtain the desired earlier date of hire. He then sought and obtained from the District Court an award of attorneys' fees. The sole question presented here is whether the District Court properly exercised its equity powers in making the award of counsel fees to the respondent.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

There are no statutes or Federal rules and regulations here involved since the only basis for the award of counsel fees to the respondent is the general equity powers of the court.

STATEMENT

The respondent sued the petitioners, Air Line Pilots Association, International, and Mackey Airlines, Inc., Master Executive Council No. 103, Air Line Pilots Association, International, seeking an Injunction and Other Relief (Complaint, R. 1-15 and amendments, R. 16-17 and R. 21-22). Hereinbelow, the petitioners will be referred to as ALPA and the Mackey MEC.

This appeal involves only the question of an award of attorneys' fees to counsel for the respondent. However, it is necessary to describe the relationship of the parties and the manner in which the parties and the trial court dealt with and disposed of the principle subject of the litigation. The relationship of the parties and the general nature of the respondent's claim is set forth in paragraph I. of the Complaint (R. 1-2) as follows:

> "This is a complaint asking for a temporary injunction, after notice, pending full hearing. In effect, it states that plaintiff is a pilot of Mackey Airlines, Inc. (herein Mackey) and has been since October 1, 1946. The Mackey pilots are and have been represented by the Airline Pilots Association, International (herein ALPA) Master Executive Council #103 (herein Mackey MEC), although plaintiff is not a member thereof. Mackey merged with Eastern Airlines, Inc. (herein Eastern) on January 8, 1967, with Eastern the surviving carrier. In anticipation of the merger, the Mackey MEC certified to ALPA Master Executive Council #108 (herein Eastern MEC), the bargaining representative of the Eastern pilots, a seniority list purporting to verify plaintiff's length of service, but upon which plaintiff's date of hire and seniority date were given as September 1, 1952. Plaintiff timely protested the erroneous 1952 date and presented evidence to the Mackey MEC including evidence requested by the Mackey MEC. Nevertheless the Mackey MEC declined to correct the error and to consider the evidence requested, and merger negotiations are continuing to the pres-

> ent, using an erroneous 1952 seniority date relating to plaintiff as the basis thereof. Plaintiff requested a hearing and an opportunity to meet the issues, but this was denied. Plaintiff contends that in so acting, ALPA and the Mackey MEC are unlawfully discriminating against him in violation of their statutory duty of fair representation.

Thus, it appears that ALPA, prior to the merger of Eastern and Mackey, was the collective bargaining representative for both the Eastern and Mackey pilots; that after the merger ALPA was the collective bargaining representative for the pilots of Eastern, the surviving carrier; that the respondent was a Mackey pilot represented by ALPA, although not a member of ALPA; that the respondent was dissatisfied with the date of hire and seniority date of September 1, 1952, and believed such date should have been October 1, 1946; and that the purpose of the suit was to force the Mackey MEC to correct such date in preparing a Mackey pilots' seniority list in anticipation of the merger.

Pursuant to Order (R. 17-18) of the trial court, the Mackey MEC merger committee changed the respondent's date of hire and seniority date from September 1, 1952, to October 1, 1946, as sought by the respondent. Another Order (R. 22-24), by agreement of counsel for the parties (R. 24), completely settled the case with the sole exception of the respondent's claim for attorneys' fees. To this latter point, ALPA (the Mackey MEC has long since ceased to exist, R. 159-160) directed a response (R. 24-27) denying therein any liability for the payment of fees to counsel for the respondent.

At this point, prior to the filing of the respondent's Motion for Summary Judgment (R. 123-124) on July 5, 1967, there was conducted before Arbitrator David Cole proceedings relative to the merging of the Eastern and Mackey pilots' seniority lists. As a result of these proceedings, the following facts were established:

1. At all times involved, the respondent was the number one pilot on the Mackey seniority list and this was irrespective to any date of hire or seniority date claimed by him, assigned to him or ultimately used for him by Arbitrator Cole (R. 244).

2. The "cumulative service date" (equivalent to seniority date, date of hire, etc.) assigned by Arbitrator Cole to the respondent was not October 1, 1946, as desired by the respondent but March 9, 1952, an advancement by Mr. Cole of five (5) months and twenty-two (22) days from the date of September 1, 1952, the date originally assigned to the respondent by the Mackey MEC merger committee (R. 222, 246, 247).

3. At all times here involved, the number two pilot on the Mackey seniority list had a seniority date later than the respondent's (R. 245).

4. In the Cole Arbitration proceedings, based on the respondent's claimed seniority date of October 1, 1946, his proposed position would have been No. 432. However, by reason of the date used, March 9, 1952, by the Cole panel, he actually emerged as No. 894 on the merged seniority list, a position still ahead of all of the other Mackey pilots (R. 244, 245).

5. The Cole arbitration panel actually used a method of determining the manner of merging the Eastern and Mackey seniority lists different from the method proposed by the Mackey pilots which method was based on the October 1, 1946, date claimed by the respondent (R. 274).

Subsequent to the arbitration proceedings and after the Eastern and Mackey seniority lists were merged, the respondent filed a Motion for Summary Judgment for counsel fees (R. 123-124), attaching thereto a supporting memorandum (R. 151-159). The cases cited by the respondent in the memorandum were based upon one or both of two circumstances: (1) the right to counsel fees where a plaintiff objects to discriminatory and oppressive conduct or abuse by a labor organization; and (2) the right to counsel fees where a plaintiff obtains relief applying to a class of individuals.

ALPA filed a memorandum of law (R. 159-164) opposing the Motion for Summary Judgment, relying therein upon two points: (1) there is no allegation in the Complaint and no proof of discriminatory and oppressive conduct or abuse of the respondent by the petitioners; and (2) the respondent did not obtain any relief applying to a class of individuals as set forth by the five facts set forth hereinabove (all of said individuals were behind the respondent on the list and were not advanced by reason of his suit).

The trial court denied the Motion for Summary Judgment (R. 168), and the cause thereafter came on for trial (R. 219-269). At the conclusion of the evidence the Court ordered the petitioners to pay to the respondent for counsel fees the sum of Four Thousand Three Hundred One

Dollars ($4,301.00) with interest thereon at the rate of six per cent (6%) (R. 204), stating as follows (R. 268-269):

> "I am going to award the amount that they asked. I am not criticizing ALPA, but I was impressed throughout this case that there was a dilemma that couldn't be solved by ALPA, and that the merging companies, apparently, were reluctant to solve the dilemma with any speed. And I do believe that the testimony of Mr. Tischler to the effect that the Mackey Group and perhaps the union, themselves, wanted the court decision in the matter.
>
> "It is true that the Court's decision is not what they hoped precisely wanted. That is, the Court referred it to the Arbitration Board and they didn't come out exactly as they hoped, but serving for the entirety, regardless of whether or not the intended gain was fully achieved or not. In other words, the lawyer is entitled to be paid even if he loses. He didn't lose in this case, but he certainly didn't win.
>
> "So draw up your findings of fact and conclusions of law along that line and that's that.
>
> "Mr. Brucker: May it please the Court, may we insert what we hope we can agree with Mr. Johnson will be a reasonable amount for today's services, which is not included in the bill.
> "The Court: No, I think you got enough. Let's not add to the burden."

In its findings of fact and conclusions of law (R. 181-203), the trial court cited (R. 203) the same eight authorities urged by the respondent in his memorandum supporting the Motion for Summary Judgment (R. 154-157) and refuted by the petitioners in their memorandum opposing the summary judgment (R. 162-164).

Following the entry of Judgment for Plaintiff (R. 204), the petitioners filed a Motion to Amend Findings of Fact and Conclusions of Law (R. 204-205) and a Petition for Rehearing (R. 205-214). By Order (R. 214-215) filed February 2, 1968, the trial court denied both motions. Thereafter, ALPA filed the Notice of Appeal (R. 218-219) and obtained a supersedeas bond (R. 215-218).

The case thereafter was briefed and orally argued before the Court of Appeals for the Fifth Circuit. The Per Curiam opinion of the Court of Appeals is as follows:

> "This appeal involves the award of counsel fees *in the equity powers of the court.* The record and appertaining law amply sustain the award." (Emphasis ours.)

The Court of Appeals then denied a Petition for Rehearing and further denied a petition by the respondent for an additional award of $4,111.93 for counsel fees for the handling of the appeal.

REASONS FOR GRANTING THE WRIT

The award of attorneys' fees to the respondent in this case constitutes an anomaly in rationality. It so far departs from the accepted and usual course of judicial proceedings, and the decision by the Court of Appeals so far sanctions such a departure by the trial court, as to call for an exercise of this Court's power of supervision.

The amount of money here involved is not great and certainly will not provoke the raising of judicial eyebrows. However, the principle of this award might have come straight from Alice in Wonderland. The following points are illustrative:

1. The Per Curiam opinion of the Court of Appeals rejects any aspect of statutory or contractual right to counsel fees and bases the award solely upon the equity powers of the court.

2. The trial judge, in his findings and conclusions of law (AR. 203), specifically held that his equitable power to award attorneys' fees rested upon one or both of two grounds: (1) the benefitting of a group; or (2) the correction of abuses.

3. The trial judge further specifically stated (AR. 268) that "he [the attorney for respondent] certainly didn't win" and that the trial court was "not criticizing ALPA." How could it have been more clearly spelled out that the trial court found no benefit to a group by the respondent and no correction by the respondent of abuses?

4. The Court of Appeals clearly misapprehended the very words of the trial judge in applying the equitable power theory to this case.

5. If the statements above quoted by the trial judge are to be given any meaning whatsoever, the trial court here found that it had no equity power to award attorneys' fees in this case.

It is entirely correct that the trial court made a substantial number of findings of fact and conclusions of law. Many of these were assigned as error by the petitioners. Without debating, however, whether such findings and conclusions are or are not correct, there can be no dispute about two matters:

1. The award was based on the benefitting of a group and/or the correction of abuses (AR. 203).

2. The trial court did not rely upon a statute or a contract but rather acted upon what it construed to be its equitable jurisdiction. The basis for the award is as follows (R. 268-269):

> "I am going to award the amount that they asked. I am not criticizing ALPA, but I was impressed throughout this case that there was a dilemma that couldn't be solved by ALPA, and that the merging companies, apparently, were reluctant to solve the dilemma with any speed. And I do believe that the testimony of Mr. Tischler to the effect that the Mackey Group and perhaps the union, themselves, wanted the Court decision in the matter.

"It is true that the Court's decision is not what they hoped precisely wanted. That is, the Court referred it to the Arbitration Board and they didn't come out exactly as they hoped, but serving for the entirety, regardless of whether or not the intended gain was fully achieved or not. In other words, the lawyer is entitled to be paid even if he loses. He didn't lose in this case, but he certainly didn't win.

"So draw up your findings of fact and conclusions of law along that line and that's that."

In 20 Am.Jur.2nd 60 there appears the following general statement relative to the award of counsel fees in federal courts:

"In federal practice it is clear that the nominal fees that may be taxed and allowed to attorneys under the general statutory provision relating to docket fees are not meant to cover the compensation to which lawyers in charge of the litigation are reasonably entitled, and the discussion herein is not concerned with attorneys' docket fees.

"An award of attorneys' fees in the federal courts may, of course, be made by virtue of a contractual right thereto. Also, specific provision is made in the federal statutes for award of attorneys' fees in various types of cases. Some of these statutes are mandatory in terms, providing that attorneys' fees 'shall' be awarded to the party bringing suit, if he is successful; others

are discretionary in terms, providing that the court 'may' grant counsel fees to the prevailing party, whether the prevailing party is the plaintiff or the defendant. But except where a valid contractual provision, federal statute, or a contrary requirement of applicable state law dictates a contrary result, the general rule may be stated that the prevailing party in an action in federal court is not entitled to recover counsel fees.

"Under exceptional circumstances a federal court applying federal law will grant attorneys' fees even in the absence of contract or statute. The exceptional circumstances which warrant the granting of a counsel fee have not been formalized into particular rules, but allowances have been made in cases coming within the historic equity jurisdiction of the federal courts, as where a party at his own expense creates or preserves a fund in which others share, or where a party is guilty of fraudulent groundless, oppressive, or vexatious conduct. However, assuming the existence of jurisdiction in the federal equity courts to allow costs as between solicitor and client and to include therein attorneys' fees in excess of the amount prescribed by statute, the purpose to authorize such costs and to make such allowance should be clearly expressed in the decree. A decree merely allowing costs to be taxed does not mean that anything is to be included on account of counsel fees in addition to the amount specified in the statute as docket fees."

The most comprehensive annotation on the subject of award of counsel fees appears in 8 L.Ed.2d 894. The annotation reads in part as follows:

> "Subject to exceptions to be discussed in §§5-9, infra, the general rule is that absence of a contrary provision of statute, rule of court, or contract, or a contrary requirement of applicable state law, the prevailing party in an action in federa' court is not entitled to recover counsel fees. This rule applies not only in actions at law, such as in actions of debt, covenant, assumpsit, or trespass, and in suits for conversion or malicious prosecution, whether the relief sought is damages or a declaratory judgment, but also in ordinary equity actions."

While the last above cited annotation runs to some forty-seven pages, there is no contention here made that any of the exceptions therein noted to the general rule obtain in this case except as delineated in the eight authorities cited by the respondent and repeated by the trial court (R. 112, 113, 203). In effect, the respondent relies upon the "historic equity jurisdiction of the federal courts" (R. 112, 112) in the two areas aforementioned: (1) discriminatory and oppressive conduct or abuse by the defendants; and (2) the obtaining by the plaintiff of relief applying to a class of individuals. At risk of reiteration, it must be noted that there is no allegation of evidence as to (1) and a specific decision by the trial court adverse to (2) (R. 268). We reemphasize the following undisputed facts:

"The defendants in this case are Air Line Pilots Association, International, and Mackey Airlines, Inc., Master Executive Council No. 103, Air Line Pilots Association, International. The merger of Eastern Air Lines, Inc., and Mackey Airlines, Inc., has been consummated. There no longer exists as an identifiable entity Mackey Airlines, Inc., Master Executive Council No. 103, Air Line Pilots Association, International. The pilots formerly employed by Mackey and formerly constituting the Mackey MEC are now employees of Eastern Airlines, Inc. and are members of ALPA Councils at Eastern.

"The claim by the plaintiff for counsel fees is based upon a claim that the above-entitled cause benefited all of the members of the Mackey MEC and that the direct benefits to the plaintiff are or were incidental to the overall material gains which resulted to the general membership of the Mackey MEC (Approximately 30-35 individuals). The plaintiff recognizes that his suit was not a class suit and never claimed to be such. He does claim that although he did not sue for a class he obtained benefits for a class.

"The defendants filed herein the Affidavit of William G. Horlacher, the Chairman of the Mackey MEC from November 1, 1965, until June 1, 1967. The Horlacher Affidavit states that no benefits resulted to any individual except the plaintiff by reason of the institution and litigation of this cause. The testimony of the witness Laughlin and the plaintiff himself is to the same effect.

"On the one hand the plaintiff contends that by and through his suit he established his date of hire as March 9, 1952. This date is approximately five and one-half months prior to the original date of hire September 1, 1952, but some five and one-half years subsequent to the seniority date of October 1, 1946, the date contended for by the plaintiff. The Cole Arbitration Panel basically utilized the 'date of hire' concept in forming a merged seniority roster. In each individual case the Cole Panel substantially determined the place of such individual on the merged seniority roster by date of hire. The Horlacher Affidavit and the evidence clearly establishes that all members of the Mackey MEC had dates of hire subsequent to October 1, 1952, and thus were unaffected in the formulation of the merged seniority roster by the Cole Panel by reason of the advance of the plaintiff's date of hire from October 1, 1952 to March 9, 1952.

"The cases cited by the plaintiff in his Memorandum and relied upon by him to establish his right to counsel fees are in each instance based upon one or both of two circumstances: (1) the right to counsel fees where a plaintiff objects to discriminatory and oppressive conduct or abuse by a labor organization; and (2) the right to counsel fees where a plaintiff obtains relief applying to a class of individuals. The cases may be classified based on the quoted portions of opinions contained in the plaintiff's Memorandum as follows:

1. Rolax v. Atlantic Coastline Railroad Company CA 4 (1951) 186 F. 2d 473, 27 LRRM 2240-46. This case was a suit wherein the plaintiffs were seeking to correct "discriminatory and oppressive conduct by a powerful labor organization."

2. Fittipaldi v. Legassi, 239 N.Y.S. 2d 792, 53 LRRM 2175-80. This case sought to correct, "certain abuses in the keeping of the . . . list . . ." In this case the Court also held that the plaintiffs "materially benefited the general membership of the unions by pointing out and aiding to correct such abuses."

3. Sprague v. Ticonic National Bank, 307, U.S. 161, 167, 59 S. Ct. 77, 780. In this case the plaintiff alleged that "she had established as a matter of law the right to recovery in relation to 14 trusts in situations like her own."

4. Barron and Holtzoff, Volume 3, page 67. This comment relates to the situation where a party "substantially benefits others."

5. Gilbert v. Hoisting Engineers, Local 701, Ore. Sup. Ct. (1963) 384 p. 2d 136, 54 LRRM 2048-51. Here the litigation resulted in "correcting abuses" and the Court said "those members of the union in good faith seek to preserve the internal democracy of their union should not have to bear the expenses of a successful suit."

6. Milone v. English, CA DC, (1962) 50 LRRM 2773-76. In this case appellants "materially aided in the creation of a fund for the benefit of the International."

7. Murray et al. v. Kelly, 14 AD, 2d 528 Aff'd. 11 N.Y. 2d 810. Here the Court said "where, as a result of the litigation, benefits are obtained" to a class.

8. Cutler vs. American Federation of Musicians of the United States and Canada et al., DC SNY (1964) 56 LRRM 2787-90. This case was brought for the purpose of correcting "union abuse."

"It need only be pointed out that there is no claim made in the plaintiff's Complaint of union abuse or misconduct or discrimination on the part of the defendants. The sole representation was that the Mackey MEC merger committee improperly assigned an incorrect date of hire to the plaintiff. There is no showing of any kind that the plaintiff acted to correct any discrimination, abuse or misconduct on the part of the defendants with respect to the members of the Mackey MEC. Additionally, and as pointed out hereinabove, there is direct evidence that the plaintiff's action did not benefit any person including himself." (R. 159-164).

CONCLUSION

This case presents a unique situation. Rarely does any litigation consist of so much froth and so little substance. The record of this suit shows that the original purpose was accomplished easily, quickly and with a minimal amount of advocacy and judicial labor. Yet the matter has proceeded all the way to a petition for certiorari in the United States Supreme Court on a sole question of the award of counsel fees to the respondent.

It requires no more than a scanning of the record to demonstrate that the real and fundamental basis of this litigation was to get attorneys' fees. At the conclusion of the trial, after the trial court has awarded a fee of $4,301.-00, there occurred the following dialogue between counsel for the respondent and the trial court (R. 268-269):

> "Mr. Bruckner: May it please the Court, may we insert what we hope we can agree with Mr. Johnson will be a reasonable amount for today's services, which is not included in the bill.
> "The Court: No, I think you got enough. Let's not add to the burden."

Again after the Court of Appeals handed down its decision, counsel for the respondent petitioned for an *additional* fee of $4,111.93. The Court of Appeals denied this thrust, but it is only reasonable to assume that some such plea will soon be wending its way to this Court, either by counter petition, direct motion or otherwise.

The important legal consideration, however, here involved is the absolute and total contradiction in this case between the trial court's finding and conclusions (R. 181-203), the legal grounds relied upon (R. 203) and what the trial court stated at trial in open court (R. 268-269). There simply is no way this contradiction can be resolved to sustain an award of counsel fees under the equitable powers of the court. Yet the Court of Appeals specifically based its affirmance on the ground of equity power. Unless the record of this case is to be completely disregarded, the following conclusions are inescapable:

1. The trial court relied upon "historic equity jurisdiction" and not upon contract, statute or specified exceptions other than those appearing in the authorities cited on page 203 of the Record.

2. These exceptions are two in number: (1) success in obtaining benefits for a group; and (2) correction of abuse. The trial court recognized and found (R. 268) that the plaintiff did not succeed in obtaining benefits for a group. Secondly, nowhere in this record is there allegation or evidence of abusive action by the petitioners, there is no claim by the respondent in his Complaint or his testimony that he corrected any abusive or discriminatory misconduct by the petitioners, and the trial court made a specific finding to this effect. (R. 268).

3. In such case there simply does not exist any legal or moral reason or precedent for the exercise of the trial court's "historic equity jurisdiction" with respect to an award of attorneys' fees to the respondent.

Respectfully submitted

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